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No. 84-569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PENNZOIL COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals for the State of West Virginia

REPLY BRIEF OF PENNZOIL COMPANY TO BRIEF IN OPPOSITION TO PETITION

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Natural Gas Policy Act of 1978, 15 U.S.C. § 3301-3421

Section 602, 15 U.S.C. § 3432 .....*passim*

OTHER SOURCES

H.R. Rep. No. 1752, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 8983 6

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On October 9, 1984, Pennzoil Company (Pennzoil) filed its Petition for a Writ of Certiorari in this case. On November 13, 1984, the Public Service Commission of West Virginia (PSC) filed its Brief in Opposition to Pennzoil's Petition. In this Reply Brief, Pennzoil addresses three issues raised for the first time in the PSC's Brief.

ARGUMENT

Although Pennzoil obviously disagrees with substantially all of the PSC's discussion of the merits of this case, this Reply Brief addresses only three major points. First, if this Court believes a written opinion from the West Virginia Supreme Court would be helpful, then

Pennzoil suggests that its Petition for Certiorari be held in abeyance temporarily pending a decision, on identical issues, in a related appeal by Pennzoil presently before the West Virginia court. Second, it appears that the PSC has conceded the second "Question Presented" in Pennzoil's Petition, regarding the applicability of Section 601 of the Natural Gas Policy Act of 1978 (NGPA), and Pennzoil therefore suggests that the Section 601 issue is no longer before the Court. Third, Pennzoil responds briefly to the PSC's attempt to portray this case as insignificant.

I. This Court May Wish To Defer Consideration Of Pennzoil's Petition Temporarily.

The PSC first argues that because the West Virginia Supreme Court did not issue a reported opinion and did not expressly address each issue presented, certiorari should be denied.[1] However, the very fact that the West Virginia Supreme Court gave Pennzoil's appeal such perfunctory treatment, in disregard of this Court's prior decision in this case, is one of the reasons this Court should grant certiorari.[2] The length of the state court's opinion does not determine the importance of the issues involved. In any event, recent developments in a related appeal by Pennzoil have rendered the PSC's argument moot.

On September 10, 1984, Pennzoil filed a Petition for Appeal with the West Virginia Supreme Court in a related case, PSC Case No. 83-333-G-42T. The issues presented to the West Virginia Supreme Court in the related case are identical to the issues presented in this case in Pennzoil's Petition for Certiorari. In Case No. 83-333-G-42T, the West Virginia Supreme Court will have an opportunity to consider, for the first time, the

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[1] PSC Brief at 5.

[2] *See* Petition for Certiorari at 14-15.

effect of FERC Order No. 391, which implemented this Court's decision in *Public Service Commission of New York v. Mid-Louisiana Gas Co.*[3]

On November 8, 1984, after a preliminary argument, the state court allowed Pennzoil's appeal, accepting the case for full briefing and argument.[4] Customarily, after full briefing and argument of an appeal, the West Virginia Supreme Court writes a full opinion disposing of the issues presented.[5] Thus, a definitive opinion from the West Virginia Supreme Court, addressing the same issues presented in Pennzoil's Petition to this Court, should be forthcoming in the very near future.

Pennzoil believes that this Court's prior decision in this case and the arguments presented in Pennzoil's Petition provide a sufficient basis for this Court to grant certiorari. However, if this Court believes that a full opinion from the West Virginia Supreme Court would be helpful, then Pennzoil respectfully suggests that, in the interest of judicial economy, this Court could hold Pennzoil's present Petition for Certiorari in abeyance temporarily. Pennzoil is confident that, after full briefing and argument, and after considering the impact of FERC Order No. 391, the West Virginia Supreme Court will decide the issues presented in Pennzoil's favor. In that event, this Court could dispose of Pennzoil's Petition for Certiorari in this case in summary fashion on the basis of the West Virginia Supreme Court decision in the related case. On the other hand, if the West Virginia Su-

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[3] 103 S. Ct. 3024 (1983).

[4] The state court's order granting Pennzoil's appeal is set forth in Appendix A hereto.

[5] In contrast, in the present case, the state court did not write a full opinion because it "denied" Pennzoil's appeal, in a process roughly equivalent to a denial of certiorari by this Court. Under West Virginia procedure, the "denial" of Pennzoil's appeal constituted a decision on the merits.

preme Court rules against Pennzoil in Case No. 83-333-G-42T, Pennzoil will file a petition for certiorari in that case, and Pennzoil's two petitions could be consolidated and considered together by this Court.

II. The PSC Has Conceded That Section 601 Of The NGPA Is Not Applicable.

In a lengthy footnote, the PSC has revised its position on the applicability of Section 601 of the NGPA to this case.[6] Although the PSC's position still is not entirely clear, it appears that the PSC now concedes that Section 601 of the NGPA does not provide an alternative ground for the PSC to deny Pennzoil the NGPA prices applicable to its production. The PSC's concession that Section 601 does not provide it with statutory authority makes this case much simpler. The PSC has eliminated the need for this Court to consider the second "Question Presented" by Pennzoil's Petition for Certiorari, and the only issue remaining in this case is the issue of the proper interpretation and implementation of Section 602 of the NGPA.

Regarding the merits of the Section 602 issue, the essential fallacy of the PSC's argument is that the PSC is focusing on the wrong point in the physical flow of Pennzoil's gas.[7] Pennzoil does not dispute the PSC's jurisdiction over the ultimate sale of Pennzoil's production to West Virginia customers. However, for purposes of determining the applicability of Section 602(a), the wellhead, and not the point of the ultimate sale, is the critical point. At the wellhead, the point of "first sale" as defined in FERC Order No. 391, *all* of Pennzoil's production is "in interstate commerce." Because the point of the "first sale" is at the wellhead, while the gas is still "in interstate commerce," Section 602(a) does not apply, and the PSC has no authority to deny the applicability of

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[6] PSC Brief at 9 n.9.

[7] PSC Brief at 6-9.

the NGPA at that point. To paraphrase this Court in *Mid-Louisiana*:

> The NGPA is designed to preserve the [West Virginia] Commission's authority under [West Virginia law] to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called "first sales" of natural gas.
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> 103 S. Ct. at 3031.

Thus, the PSC has the authority to regulate the price Pennzoil may collect in the ultimate sale to the end-user, but the PSC may not reduce the NGPA price which attaches at the wellhead in the intracorporate transfer recognized in *Mid-Louisiana*. Under the NGPA, the PSC may only regulate the components of Pennzoil's rate that are over and above the NGPA price applicable to Pennzoil's own production.

III. The PSC's Attempts To Minimize The Significance Of This Case Help To Demonstrate Why Certiorari Is Necessary.

In its closing argument, the PSC attempts to belittle the importance of the issues presented in Pennzoil's Petition. As this Court already recognized, when it granted certiorari previously in this very case, the matters at issue are significant. The PSC's assertions exemplify its blind refusal to recognize federal law.

First, the PSC states that "even if Section 602 were not applicable," the PSC's actions in this case would be justified, "for Congress has not clearly indicated its intent to preempt state regulation of intrastate gas pricing." PSC Brief at 9 n.9. Contrary to the PSC's argument, however, the Conference Report indicates that Congress expressly preempted the entire field, ceding back to the States only the authority to regulate prices to the ex-

tent authorized in Section 602.[8] Thus, if Section 602 is not applicable, then state regulation of the 'first sale" price is totally preempted.[9] Because it is so obviously contrary to the intent of Congress and this Court's prior decisions, the PSC's preemption argument alone provides sufficient reason for this Court to grant certiorari.

Second, the PSC concedes that it "has no intent to regulate the wellhead price of non-utility producers in West Virginia," and that "its jurisdiction is limited to utilities." PSC Brief at 10. That statement demonstrates one of the reasons why Section 602 of the NGPA cannot authorize the PSC's actions. As set forth in Pennzoil's Petition, Congress intended Section 602 to allow the States to set uniform maximum lawful prices applicable to *all* first sales in intrastate commerce within the State. Petition at 20-22. In contrast, the PSC has interpreted Section 602 to allow it to establish the wellhead price of gas produced by companies who happen to fall within the classification of utilities, such as Pennzoil, while leaving non-utility producers free of state regulation. That non-uniformity of treatment between "utility" producers and "non-utility" producers is exactly what Congress intended to do away with in the NGPA.[10]

Finally, the PSC's arguments ignore the fundamental importance of promptly resolving the pending questions regarding the proper implementation of Section 602. On

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[8] H.R. Rep. No. 1752, 95th Cong., 2d Sess. 124-25, *reprinted in* 1978 U.S. Code Cong. & Ad. News 8983, 9041.

[9] Exxon Corp. v. Eagerton, 103 S. Ct. 2296, 2303 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 103 S. Ct. 697, 710 (1983).

[10] *Mid-Louisiana*, 103 S. Ct. at 3034 ("Given such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded. For the usefulness of natural gas does not depend on who produces it....")

January 1, 1985, the NGPA price ceilings applicable to certain categories of gas will be removed.[11] After that date, if the free market price of gas rises in the absence of federal controls, there will be increasing pressure in many States to implement the authority granted by Section 602 to hold prices for intrastate sales down. This case will determine whether this Court's decision in *Mid-Louisiana* may be negated by state commissions purporting to implement Section 602 through utility ratemaking proceedings.

CONCLUSION

The PSC's arguments in opposition to certiorari highlight the PSC's disregard for this Court's previous decision in this case and for the intent of Congress. To prevent the West Virginia PSC from continuing to violate federal law, this Court should grant certiorari.

Respectfully submitted,

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[11] *See* NGPA § 121, 15 U.S.C. § 3331.

APPENDIX

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of November, 1984, the following order was made and entered, to wit:

Case. No. 83-333-G-42T

PENNZOIL COMPANY, a corporation,
Petitioner

vs.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
THE CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Party Respondent

Upon petition for an appeal from, suspension and review of the final order of the Public Service Commission of West Virginia made and entered on August 10, 1984.

This day came the petitioner and respondent by their respective counsel, pursuant to the Court's order entered in this proceeding on the 13th day of September, 1984, fixing this date for hearing upon the petition filed herein on the 10th day of September, 1984, and the Public Service Commission tendered and filed all papers, documents, evidence, and records, or certified copies thereof, which were before the Commission at the hearing which resulted in the order complained of herein, together with a written statement of its reasons for the entry of said order filed November 2, 1984. And the Court having maturely considered the petition and exhibits, with certificate of service, petition and note of argument of intervenor, The Consumer Advocate of The Public Service

Commission, the original record, the statement of reasons of the Commission and the argument of counsel thereon, is of opinion to and doth hereby grant the appeal, suspension and review of said order of August 10, 1984, of [sic] as prayed for in said petition.

It is further ordered that copies of this order shall be delivered forthwith to the Secretary of the Public Service Commission; Goodwin and Goodwin and C. E. Goodwin, John B. Chapman, Baker & Botts, Bruce F. Kiely and Kirk K. Van Tine, counsel for the petitioner, Pennzoil Company, a corporation; Robert R. Rodecker and Daniel L. Frutchey, counsel for the respondent Public Service Commission of West Virginia; Denise C. Goulet, Deputy Consumer Advocate, counsel for the intervenor, The Consumer Advocate Division of the Public Service Commission; as due notice to them of the entry hereof.

A True Copy

Attest: /s/ George W. Singleton
Clerk
Supreme Court of Appeals